Supreme Court, U.S.
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No. 96-510

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM BLAND, *et al.*,

Petitioners,

v.

DANIEL WM. FESSLER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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8 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. The Numbers Presented By Respondents Regarding The Amount Of Calls Placed By ADADs Are Wrong And Irrelevant 1

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Page

Lysaght v. State of N.J., 837 F. Supp. 646 (D.N.J. 1993) 3

Martin v. City of Struthers, 319 U.S. 141 (1943) 5

Moser v. Frohnmayer, 315 Or. 372, 845 P.2d 1284 (Or. 1993) 3

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 3

State by Humphrey v. Casino Marketing, 491 N.W.2d 882 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993) 1

STATUTES

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 47 U.S.C.A. § 227 (West 1994) 5

INTRODUCTION

Petitioners William Bland and the National Association of Telecomputer Operators ("Petitioners") presented several compelling reasons why this Court should grant a writ of certiorari in this case. Respondents' opposition fails to refute those reasons. Rather, Respondents present nothing more than unsubstantiated "doomsday" numbers regarding the use of ADADs in an attempt to prevent rational analysis of the facts and the controlling legal authority.

When this smokescreen is blown away, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

I. The Numbers Presented By Respondents Regarding The Amount Of Calls Placed By ADADs Are Wrong And Irrelevant

A central theme asserted by Respondents in their opposition, as well as throughout this case, is the notion that citizens would be inundated with an "onslaught" of telephone calls by ADADs. This argument is flawed in two ways: First, the numbers asserted by Respondents are internally inconsistent, and; Second, they are irrelevant.

Respondents assert that "less than 200 ADADs can call every home in the United States once a week" (Opposition, p. 1, relying on *State by Humphrey v. Casino Marketing Group*, 491 N.W.2d 882, 888 n.4 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993)) and also state that each ADAD has the capability of placing 1,000 calls[1] per day (Opposition, p. 4, n.11). Even

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[1] It should be noted that the significant figure is not how many telephone numbers that an ADAD can "call." Rather, it

assuming an ADAD makes 1,000 calls a day, these numbers do not compute. 200 ADADs making 1,000 calls a day totals 200,000 calls a day or 1,400,000 a week. That is hardly the 97 million calls necessary to reach every American household.[2] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1995*, p. 1, (115th edition), Washington, D.C., 1995 (97 million households in America). Indeed, Respondents' numbers add up to *approximately one call a year to each household.*

Respondents then contradict themselves by claiming that "more than 10,000 ADADs have been sold with the capacity of generating an astonishing 10 million calls a day" (Opposition, p. 5). Under these figures, since there are 97 million households in America, it would take *10,000* ADADs approximately 9.7 days to call every household. Yet, Respondents had already asserted that a mere *200* ADADs could do this in one week. Again, the numbers do not compute.

Finally, Respondents assert that "in 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day." Opposition, p. 5. This translates into 38.9 calls per ADAD per day, not 1,000 calls per ADAD per day as Respondents previously asserted. One must ask

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is the number of calls actually received that is relevant to any privacy issue since most telephone calls are unanswered. Respondents never introduced any evidence on this point.

[2] Indeed, the truly significant number is the number of telephone numbers that would have to be called, which must be much larger than the number of households because so many people have multiple phone numbers (work, home, car). The proliferation of telephone numbers is demonstrated by the continual need to add additional area codes.

Respondents, is it 1,000 calls per ADAD per day or only 38.9?

Indeed, what Respondents have always ignored is the simple fact that the Oregon Supreme Court and a District Court in New Jersey have held that those states' respective ADAD statutes violate free speech rights, and thus, the use of ADADs is not prohibited in those states. *See Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (Or. 1993) (Oregon Constitution); *Lysaght v. State of New Jersey*, 837 F. Supp. 646 (D.N.J. 1993). If it were true that, without live operators, ADAD calls would swamp telephones throughout the land, surely Respondents would have merely looked to these two states for proof of this. Tellingly, they did not.

In seeking to impose a regulation on speech, it is the government that has the burden of demonstrating that the alleged harms it seeks to remedy are real, and not "mere speculation and conjecture." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Respondents' Opposition did not cite any evidence that demonstrated that ADAD calls present real and concrete harms. Respondents did not cite such evidence because none was ever presented throughout this case.

The prohibition on the use of ADADs cannot be justified if there is no demonstration that a substantial interest is threatened by the use of ADADs. Here, Respondents' unsupported assertions of an "onslaught" of ADAD calls does not meet their burden to prove that a prohibition on speech is justified.

Rather, Respondents are attempting to cloud the issues in this case by presenting a "sky is falling" argument about ADADs. This argument is flawed to begin with because it assumes that every ADAD will be used every day, twelve hours a day, seven days a

week, 365 days a year. There is no evidence to support such an assertion.

Respondents' argument is much like the old story that with enough time, enough monkeys, and enough typewriters, one could duplicate Shakespeare's works. Surely, no one would ban typewriters because of the racket such typing could create if this were to occur. Similarly, ADADs should not be banned because of what they could do, anymore than we would ban all cars because of what could happen if every car was driven every day, twenty-four hours a day, seven days a week, 365 days a year.

Moreover, Respondents cite their numbers to prove that if ADADs generate so many calls, there can be no privacy. Yet, the two statutes that Respondents are defending do not protect privacy, because they allow the use of machines to place unsolicited telephone calls so long as a live operator comes on the line briefly. But this happens after the call has been answered, *i.e.*, after any invasion of privacy has occurred. Thus, whatever the true numbers are, they are irrelevant because the statutes do not protect privacy.

Finally, the exact same arguments could have been made in connection with regulations that prohibited door to door solicitation. Theoretically, every person in America could decide to engage in door to door solicitation and, theoretically, every householder could have their doorbell rang every second of the day! Such fun-with-numbers arguments do not change the simple fact that there is an alternative to banning speech by telephone: a do not call list.[3] No scare-tactic

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[3] Respondents assert that there was no evidence presented that a do not call list is feasible. Opposition, p. 8. However, Respondents have never even attempted to dispute that such a

smokescreen will change this and, under *Martin v. Struthers*, 319 U.S. 141 (1943), this alternative renders the statutes at issue unconstitutional.

CONCLUSION

For all of the reasons set forth above and in the opening petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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system is in use in Florida. C.A. App. 820. Indeed, with all of the expertise and resources at the Public Utilities Commission's disposal, what is startling is that it offers not one shred of evidence that such a system would not be feasible. Finally, the U.S. Congress has determined that such a system is feasible - it is required under the federal Telephone Consumer Protection Act. *See* 47 U.S.C. § 227(c)(3) & (4); 47 C.F.R. § 64.1200(e)(2).